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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1958

NO. 502

MRS. GLADYS MAYEAUX LABORDE, et al.,
Petitioners

*versus*

TEXAS AND PACIFIC RAILWAY COMPANY,
Respondent

***PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT***

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## *PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

Mrs. Gladys Mayeaux Laborde and Dalton L. Laborde pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on June 30, 1958.

## CITATIONS TO OPINIONS BELOW

The opinion of the United States District Court in and for the Western District of Louisiana is unreported and is printed in Appendix B hereto, *infra*, p. 23. The opinion of the United States Court of Appeals for the Fifth Circuit, printed in Appendix B hereto, *infra*, p. 30, has not been reported as of this writing.

## JURISDICTION

The judgment of the Court of Appeals was entered on June 30, 1958. R. 389; p. 47, *infra*. Rehearing was denied on August 11, 1958. R. 397. The jurisdiction of this Honorable Court is invoked under 28 U.S.C., Section 1254 (1).

## QUESTIONS PRESENTED

(1) Whether there is an irreconcible conflict between the decisions of the various panels of the Court of Appeals for the Fifth Circuit in Louisiana railroad crossing cases.
(2) Whether the Court of Appeals violated the public policy of the State of Louisiana in railroad crossing cases.
(3) Whether the Court of Appeals exceeded its reviewing power by making findings of fact at variance with the findings of the jury and district judge.

## STATUTE INVOLVED

The Louisiana statutory provision involved in question (2) is Louisiana Revised Statutes of 1950, Title 45, Section 563. It is printed in Appendix A, *infra*, p. 21.

## STATEMENT

On April 30, 1956, petitioner, Mrs. Gladys Mayeaux Laborde, a Louisiana citizen, filed a complaint (R. 1) in the United States District Court for the Western District of Louisiana against respondent, Texas and Pacific Rail-

way Company, a Texas corporation, for damages she sustained when she was seriously injured on August 11, 1955 when her automobile was struck by the front of one of respondent's freight locomotives on a private, rural crossing three miles south of the Town of Bunkie, Avoyelles Parish, Louisiana. Her husband, Dalton L. Laborde, joined as plaintiff in the suit, suing for medical and other expenses recoverable only by the husband of a married woman under Louisiana community property laws. The basis for original federal jurisdiction is diversity of citizenship, with requisite amount in controversy. Without certain significant elaboration at this point, the facts leading up to the collision are substantially as stated in footnote 2 by the Court of Appeals. (R. 371; Appendix B, *infra*, p. 32.)

Respondent railroad answered with a general denial of negligence on its part and specially pleaded contributory negligence of Mrs. Laborde in the alternative (R. 10). The case was tried June 13 through 19, 1957. On the latter date, the case was submitted to the jury on special interrogatories addressing themselves to the questions of negligence of the railroad, contributory negligence and proximate causation (R. 343). The jury found proximate negligence on the part of the railroad, no proximate contributory negligence on the part of Mrs. Laborde, and returned a verdict in favor of both petitioners in the total amount of $20,000.00 (R. 344).

Respondent filed motions for judgment notwithstanding the verdict and, alternatively, for a new trial (R. 346) which were taken under advisement along with defendant's previous motion for directed verdict (R. 337). All motions were denied by the district court on December 9, 1957, with written reasons (R. 351; Appendix B, *infra*, p. 23). Formal judgment in accordance with the jury's

verdict was rendered on December 23, 1957 (R. 358). Respondent appealed to the Court of Appeals for the Fifth Circuit, designating the district court's denial of its post trial motions as errors (R. 362).

The principal negligent omissions relied upon by petitioners were respondent's failure to:

1) properly maintain its right of way in the area of the crossing so as to allow an approaching motorist a view up and down the tracks, and to

2) sound a timely and effective warning as its locomotive approached the crossing when the locomotive crew was able to see Mrs. Laborde approaching and should have appreciated the danger of a collision due to her inability to discover the train.

In support of the first point petitioners introduced photographs of the crossing and testimony of several witnesses to the effect that grass, weeds and other obstructions were permitted to grow on the railroad right of way to such a height as to obscure, if not completely block, a motorist's view of the track and of any train which might be approaching thereon. In support of the second point petitioners introduced the testimony of two disinterested eye-witnesses who gave the position of the locomotive when the signal horn was first sounded. Time and distance calculations show that the signal was not sounded until approximately one second before the collision,[1] even though the train crew admitted that Mrs.

[1] Witness O'Neal placed the locomotive between a set of telephone poles (by railroad witness Ponder's measurements, 106 feet from the crossing) and a cattle guard (22 feet from the crossing) when the warning was first sounded; witness Voorhies placed it 45 to 50 feet from the cattle guard, or 67 to 72 feet from the crossing. According to the railroad's speed tape, the train was going 50 mph at the time of the collision, or 73 feet per second.

Laborde could be seen approaching the crossing for a distance of some 85 feet.

Respondent introduced evidence, consisting of the testimony of its employees and a passing motorist, tending to show that it was possible for a motorist to gain a view of an approaching train at the crossing and that a timely warning had been sounded.

Responding to specific interrogatories, and with benefit of instructions to which no objection was raised by either side, the jury resolved the conflict in the evidence in favor of petitioners. The district judge, in ruling upon respondent's motions, found ample evidence in the record to support the jury's findings of negligence on the part of the railroad and of no contributory negligence on the part of Mrs. Laborde.

The Court of Appeals reversed the verdict and judgment of the jury and district judge, finding that Mrs. Laborde was guilty of contributory negligence as a matter of law. That court also stated that it found the railroad to be free from negligence but did not assume to hold that the jury had erred in finding the railroad guilty of negligence. Accordingly, it appears to have based its reversal of the district court primarily on the finding of contributory negligence as a matter of law.

## *REASONS FOR GRANTING THE WRIT*

1. The Court of Appeals for the Fifth Circuit, hearing railroad crossing cases in three judge panels, has reached irreconcilable results in suits by the driver of the automobile. Regardless of how the instant decision is phrased, it essentially is a holding that the driver's verdict against the railroad in such cases cannot be sustained on appeal because contributory negligence is implicit as a matter

of law. Petitioners submit that the Court of Appeals has hereby infringed upon their constitutional right to trial by jury and has deprived them of property without due process of law.

The Court of Appeals considered *Brinson v. Illinois Central Railroad Company*, 241 F. 2d 494, controlling in the present case (R. 387; Appendix B, *infra*, p. 45). The Court quoted from the *Brinson* case in its opinion (R. 384; Appendix B, *infra*, p. 43). The quoted portion and the entire *Brinson* opinion clearly indicate that the controlling facts were undisputed and that the driver "could have easily stopped the car * * * after passing the north edge of the farm machinery" which was on the railroad right of way and constituted a visual obstruction. Among a number of other distinguishing factors,[2] no such "undisputed" facts are found in the present case, because the visual obstruction in this case continued all the way up to the railroad tracks. Furthermore, visual obstructions vary in type. In some cases cited in this litigation the obstruction was in the form of boxcars on a siding or high stacks of crossties, produce or merchandise on the right of way near crossings. A motorist can readily appreciate that such objects would totally and unquestionably block his view of any train which might be approaching. But high grass and weeds alongside a gravel road are a different variety of obstruction, and the jury and district judge were justified in so finding. It was reasonable and conscionable for them to find that,

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[2] In the *Brinson* case:

a. the driver and passenger were very familiar with the crossing involved;

b. visual warning was given by the headlight "at least fifty feet on each side of the main-line track";

c. the air horn and bell were sounded at an effective distance from the crossing;

d. there was no indication as to what, if any, precautions were taken by the driver;

e. the verdict was disapproved by the district judge.

proceeding with caution inside her automobile; as the law allows her to do, Mrs. Laborde was not negligent in failing to realize the possible danger of her situation and in believing that an approaching train could and would be seen in time to stop. There was no string of boxcars on the right of way to warn her that she could not possibly see an approaching train; there was an expanse of vegetation on the right of way, and without instantly applying the rules of trigonometry to her situation she could not know that this vegetation was of such a height as to hide an approaching train from view.[3]

The Court of Appeals adopted the rule restated in the *Brinson* case: the greater the difficulty of seeing and hearing the train as he approaches the crossing, the greater caution the law imposes upon the motorist. This rule has doubtless been urged upon every court hearing a railroad crossing case and the jury was so charged here; but no court has held that the rules of judicial review must yield to it. It is for the jury charged with this rule to determine whether the requisite caution was exercised by the motorist and to decide whether the motorist or the railroad was proximately responsible for the accident.

The panel of the Court of Appeals deciding the instant case failed to consider the doctrine of proximate causation in relation to the jury's fixing of blame for the accident, whereas other panels of that court have properly done so in reviewing approved jury verdicts. By statute in Louisiana, proximate causation is for the jury in railroad crossing accidents even if the statutory requirement to stop, look and listen is violated by the mo-

[3] A number of erroneous conclusions of fact and factual inferences were set forth in the Court of Appeals opinion; these are cited in part 3, *infra*.

torist. In the instant case, there was no legal duty to stop but Mrs. Laborde did so anyhow. The Court of Appeals made no mention of the statute and found Mrs. Laborde *ipso facto* guilty of negligence for not discovering the approaching train in time to stop. Petitioners would have no quarrel with such finding if respondent's negligence had not been relevant to her failure to discover. That is if visibility had been clear at the crossing and the trainmen had sounded a timely warning, even though the railroad might have been negligent in other particulars (exceeding safe or lawful speed, defective maintenance of grade crossing, defective brakes, etc.), it might reasonably be concluded that there was no proximate relationship between its negligence and the accident, or that Mrs. Laborde was nevertheless contributorily negligence for not seeing or hearing the train. But here Mrs. Laborde's very failure to see or hear is the proximate result of the railroad's negligence in failing to afford her a view or give her a timely audible signal. Failure of the Court of Appeals to consider the proximate relationship of the acts of negligence to the occurrence of the accident will inevitably lead to a finding of contributory negligence as a matter of law in every crossing accident.

This Honorable Court set the modern standard for appellate courts in cases of this sort in *Pokora v. Wabash Railway Company*, 292 U.S. 98, 54 Sup. Ct. 580. On a set of operative facts quite similar to those in the present case, the district court had directed a verdict for defendant. This was affirmed by the Court of Appeals for the Seventh Circuit on a finding of contributory negligence as a matter of law. Reversing the Court of Appeals the Supreme Court, through Mr. Justice Cardozo, placed the burden of proving contributory negligence on the defend-

ant,[4] by showing conclusively that Pokora had or should have seen or heard the train in time to stop. The jury having found no contributory negligence, it was held that the Court of Appeals lacked authority to substitute its judgment of disputed facts when "rational and candid minds" could have found otherwise.[5]

It was also recognized in the *Pokora* case that a motorist is not required to be infallible to be entitled to collect the judgment which a district court awards him.[6] This point is made quite clear in decisions by other panels of the Fifth Circuit Court of Appeals in other recent cases indistinguishable from the case at bar. There can be no real and consequential distinction made between this case and the following Louisiana railroad crossing cases from the Fifth Circuit: *Henwood v. Wallace*, 159 F. 2d 263;

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[4] "The burden of proof was on the defendant to make out the defense of contributory negligence.* * * The record does not show in any conclusive way that the train was visible to Pokora while there was still time to stop.* * * For all that appears he had no view of the main track northward, or none for a substantial distance, till the train was so near that escape had been cut off." (*Pokora, supra*, 54S. Ct. 580, 581)

[5] "In such circumstances, the question, we think, was for the jury whether reasonable caution forbade his going forward in reliance on the sense of hearing, unaided by that of sight. No doubt it was his duty to look along the track from his seat, if looking would avail to warn him of the danger. This does not mean, however, that if vision was cut off by obstacles, there was negligence in going on, any more than there would have been in trusting to his ears if vision had been cut off by the darkness of the night.* * *" (54 S. Ct. 580, 581)

"Other courts, the majority, adopt the rule that the traveler must look and listen, but that the existence of a duty to stop depends upon the circumstances, and hence generally, even if not invariably, upon the judgment of the jury.* * *

If we assume that by reason of the box cars, there was a duty to stop again when the obstructions had been cleared, that duty did not arise unless a stop could be made safely after the point of clearance had been reached.* * * For reasons already stated, the testimony permits the inference that the truck was in the zone of danger by the time the field of vision was enlarged.* * * His case was for the jury, unless as a matter of law he was subject to a duty to get out of the vehicle before it crossed the switch, walk forward to the front, and then, afoot, survey the scene. We must say whether his failure to do this was negligence so obvious and certain that one conclusion and one only is permissible for rational and candid minds.* * *" (54 S Ct. 580, 582)

[6] "One must remember that while the traveler turns his eyes in one direction, a train or a loose engine may be approaching from the other." (54 S. Ct. 580, 583)

*Illinois Central Railroad Company v. Aucoin*, 195 F. 2d 983; and *Texas and Pacific Railway Company v. Watkins*, 243 F. 2d 171. These, as well as *Ruhl v. Missouri Pacific Railroad Company*, 304 S.W. 2d 16, an apposite Missouri decision, were erroneously distinguished or disregarded by the Court of Appeals in favor of the *Brinson* case which is clearly distinguishable and did not involve an approved jury verdict. The *Henwood* case, in which this Honorable Court denied certiorari (331 U.S. 820; 67 Sup. Ct. 1310), found the Court of Appeals expressly recognizing the adoption of the *Pokora* doctrine by Louisiana appellate courts.[7] The *Aucoin* case found the Court of Appeals recognizing that though a motorist may necessarily be guilty of some degree of inattention when he collides with a railroad train in broad daylight, it did not have the power to upset the jury's fixing of proximate blame.[8] The *Watkins* case, decided after the *Brin-*

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[7] "The decisive question before us is whether the appellant was guilty of contributory negligence as a matter of law. The burden of proving that he was so contributorily negligent was on the defendant. The verdict of the jury necessarily implies a finding that the defendant failed to meet this burden. Also, implicit in the verdict is a finding that, as the plaintiff approached the crossing, the train was not visible to him while there was still time to stop.* * *" (*Henwood, supra*, 159 F. 2d. 263, 264)

"Since the *Pokora* case has been cited with approval by the Court of Appeal of Louisiana in the *Robertson* case, *post*, it is reasonable to conclude that the law of Louisiana is in harmony with the *Pokora* doctrine. Even under the act of 1938 there is no absolute command to stop, look and listen in the event it is impossible to do so. When the appellee found that his view was cut off, the statute authorized him to proceed with the greatest caution and at his peril. This is what the plaintiff testified he did. The words of the statute, "at their peril", have no reference to the risk of being held guilty of contributory negligence, because the history of the statute refutes such legislative intent. if this were not true, then a motorist who failed to stop would be guilty of contributory negligence as a matter of law, and the Louisiana courts would doubtless have said so instead of saying that if his view is obstructed he may proceed cautiously until a view may be had." (159 F. 2d 263, 266)

[8] "The circumstances shown in evidence present a typical jury question The evidence is replete with conflict. Every driver is necessarily guilty of some degree of inattention when he collides with a railroad train in broad daylight. But whether such inattention amounts to negligence, or intervening negligence on the part of the railroad company, or both, was the proximate cause of the collision, is a jury question.* * *

(Continued)

*son* case, found the Court of Appeals recognizing that it is begging the question to argue that the motorist's acts show contributory negligence as a matter of law by assuming (when a jury has decided otherwise) that the motorist had actual or constructive knowledge that a train was coming.[9] Each of these recent Fifth Circuit cases involved jury verdicts approved by the district judge, not mere affirmation of the district judge's granting a motion for judgment n. o. v. or the decision by the triers or reviewers of the facts that contributory negligence was shown as a matter of fact. Each of these cases is factually much closer to the instant case than any cited by the Court of Appeals.

The panel deciding the instant case tacitly admitted the irreconcilable conflict in this type case in its treatment of the *Aucoin* and *Watkins* cases (R. 386-7; Appendix B, *infra*, p. 44). In failing to distinguish these cases in any manner while deciding contrariwise, the panel clearly indicates that it simply disagrees with the panel deciding *Aucoin* and *Watkins* in this type case.

The confusion and uncertainty resulting from this con-

[8] (Continued)

"* * * Nor in view of the obstruction, created in part by the railway company itself, which impeded the view toward the south of the crossing, and in view of plaintiff's testimony, corroborated by another witness, that he stopped his car, looked and listened, before going on the track, can it be said that plaintiff as guilty of such contributory negligence as would bar his recovery as a matter of law * * * even though there is also evidence that whistle and bell warnings were sounded. These are countervailing considerations, to be resolved by a jury." * * *" (*Aucoin, supra*, 195 F. 2d 983, 985)

[9] "The first is that the necessity for sudden action in these fleeting moments was precipitated by the train's failure earlier to blow an audible warning signal and repeat it if necessary as the engine broke through the fog and could see, had lookout been kept, the tractor on its apparent course toward destruction. Whether with fog obscuring the track beyond 75 feet he ought to have anticipated that a train would suddenly emerge without warning, whether with fifteen feet and one second then between him and eternity Watkins ought to have stopped and had he, whether with time and distance for response and subsequent braking action, he could have stopped, whether he should have turned to the left instead of the right, was the very stuff of which the ordinary prudent man is compounded." (*Watkins, supra*, 243 F. 2d 171, 173)

flict affects every railroad crossing case arising in this jurisdiction. As the latest expression from the Fifth Circuit Court in an area of law which has long perplexed federal district judges in Louisiana, this decision will now result in litigants being deprived of their right to trial by jury by standing as authority for direction of verdicts and judgments n. o. v. in cases presenting sound jury issues. Accordingly it is necessary and proper in the public interest that the Supreme Court grant certiorari herein to review this case in relation to other decisions of the Fifth Circuit Court of Appeals and prevailing legal principles.

2. Louisiana public policy is expressed in Louisiana Revised Statutes 45:563 (Appendix A, *infra*, p. 21). The statute requires a motorist to stop and look at public railroad crossings, but it expressly provides that violation of this requirement is not a bar to recovery of damages incurred in a crossing accident. Instead it makes basic negligence, contributory negligence and proximate causation jury questions. Louisiana law contains no directives to the motorist or the railroad at private crossings. *A fortiori*, the public policy should be the same in private crossing cases, for certainly one who violates a statute is entitled to no better treatment than one who does not. This case does not involve a question of violation of a statutory duty of care but of an implied in law duty of care on the part of the railroad and the motorist. It is Louisiana's public policy that the jury is to determine whether the railroad was negligent, whether the motorist was negligent and, if both were negligent, whose negligence was the proximate cause of the accident. The district judge recognized this in footnote 2 of his opinion (R. 356; Appendix B, *infra*, p. 28). The Fifth Circuit Court of Appeals recognized this likewise in *Henwood v. Wallace*, *supra*, limiting its effect only in cases "where

the facts are undisputed and there is an absence of conflicting inferences'" (159 F. 2d 263, 265).

Petitioners therefore urge this Honorable Court to grant certiorari herein in that the Court of Appeals' decision violates the statutorily declared public policy of the State of Louisiana.

3. It has not been disputed throughout this litigation that it is actionable negligence in Louisiana for a railroad to permit its right of way to become so grown over with grass, brush, bushes, trees and weeds in a crossing area as to block a motorist's view of approaching trains. *Guillot v. Texas and Pacific Railway Company*, 8 La. App. 143. And although the Court of Appeals correctly concluded that trainmen may assume that a motorist approaching a crossing is going to stop when a train is coming, that court likewise correctly modified the rule by stating that this is so "unless they have evidence to the contrary" (R. 380; Appendix B, *infra*, p. 39). If there is evidence which does or should warn the trainmen that the motorist does not or cannot perceive their approach, the duty falls upon them to sound timely and effective warning. *Smith v. Texas and Pacific Railway Company*, 189 So. 316.

After the jury made its decision on the facts and law presented to it, that decision was put to the appropriate legal test by the district judge, quoting from a Fifth Circuit decision in his opinion on respondent's motions: "• • • a motion for a directed verdict or for a judgment notwithstanding the verdict can be granted only when there is no evidence which, if believed would authorize a verdict against the movant, while the district judge may grant a new trial when he thinks the verdict is wrong, though supported by some evidence. • • • " (R. 352, Appendix B, *infra*, p. 24). The district judge found

ample credible evidence to support the verdict and did not find the result wrong or unconscionable notwithstanding the verdict. The district judge correctly refrained from speculation on how the evidence might otherwise have been interpreted and reviewed it in the light most favorable to sustainment of the verdict.

The Court of Appeals erred in making new findings of fact at variance with those found below through the process of reviewing the facts in the light least favorable to sustainment of the verdict and judgment of the district court. For instance the Court of Appeals arrived at the following conclusions not borne out, much less compelled in the exercise of right reason, by the evidence:

1) that the obstructions at the crossing were of such a height and nature as **not** to block Mrs. Laborde's view (R. 385; Appendix B, *infra*, p. 43);[10]

2) that Mrs. Laborde could have had a full view of the train had she come to a stop and looked at a point nearer to the tracks (R. 381; Appendix B, infra, p. 40);[11]

3) that Mrs. Laborde took only a "hasty glance" up and down the tracks and took no other precautions before driving onto the tracks (R. 382; Appendix B, *infra*, p. 41);[12]

4) that one of petitioners' witnesses (O'Neal)

[10] The physical determination of the height of the grass and weeds in the vicinity of the crossing was strictly one for the jury which had decided it on the basis of testimony, photographs and a sample of grass, all of which constituted part of the record before the Court of Appeals. It is submitted that the exhibits speak for themselves and, if certiorari is granted herein, they should be made part of the record before the Supreme Court.

[11] This was a physical determination for the jury. The photographs indicated that the grass and weeds extended all the way up to the immediate area of the tracks.

[12] Mrs. Laborde's testimony on this point (R. 128) implies more that she continued to observe and listen than that she proceeded forward carelessly and without regard for her own safety.

> testified that the engineer began to blow the whistle when Mrs. Laborde first turned off the highway to enter the gravel road and that this fact is not disputed by the positive testimony of any witness (R. 380; Appendix B, *infra*, p. 39).[13]

While Louisiana appellate courts are authorized by the state constitution to review lower court decisions on questions of both fact and law and to arrive at conclusions of fact at variance with these of the triers of fact, it is well recognized that federal appellate courts are without such authority. It is implicit in its verdict that the jury found otherwise than the Court of Appeals, and the district judge explicitly found otherwise with regard to some of the above points. In addition to the above conclusions, the Court of Appeals opinion contains the following factual inferences neither compelled nor supported by the evidence:

1) that the place where Mrs. Laborde made her initial observation of the railroad tracks was not an appropriate place nor at an appropriate distance from the tracks;[14]

2) that there was no evidence tending to show that Mrs. Laborde's view would have been blocked had she made observations closer to the tracks;[15]

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[13] This is a mistake by the Court of Appeals. Mr. O'Neal never alluded in any manner to Mrs. Laborde's location when the warning was first sounded or at any other time. However, he, Voorhies and Mrs. Loborde all testified positively as to when the warning was first sounded.

[14] This is contrary to Louisiana law as announced in the above-cited statute dealing with public crossings which requires the motorist to stop between 10 and 50 feet of the crossing.

[15] This in effect relieves respondent of the burden of proving contributory negligence and shifts the burden to petitioners to negative contributory negligence. In any event, there is no evidence of such heedlessness on Mrs. Laborde's part. Viewed in the light most favorable to sustainment of the verdict, the evidence indicates that she came to a virtual stop 30 feet from the crossing, looked and listened for a train, neither saw nor heard one approaching, shifted into low gear and slowly drove up the incline still observing for a train but being unable to see or hear the train until the last instant because of high grass and weeds and the failure of the trainmen to sound the warning.

3) that conditions at the crossing were **not** such as to have forewarned the train crew that Mrs. Laborde's view might be blocked.[16]

The four conclusions of fact first enumerated above and the three factual inferences next enumerated are all crucial to the Court of Appeals decision, for without such a basis the cases which that court cited in support of its finding of contributory negligence as a matter of law have no applicability. Indeed these authorities are not apposite to the instant case for other reasons, but it is unnecessary here to distinguish them. Sufficient to say that, with a single exception, these cases are: (1) decisions of Louisiana appellate courts where such courts made findings of contributory negligence as a matter of fact, (2) decisions of federal district courts sitting without juries where the courts simply found contributory negligence as a matter of fact; *Lewis v. Thompson*, 47 Fed. Supp. 435; *Teston v. Thompson*, 77 Fed. Supp. 823; (3) reviews of decisions of federal district judges to determine whether they had abused their peculiar quasi-fact finding power and discretion in ruling in favor of the railroad upon motions for judgment non obstante verdicto. *Brinson v. Illinois Central Railroad Company, supra; Brown v. Louisville and Nashville Railway Company*, 234 F. 2d 128.

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[16] This assumes that the weeds and grass were not high enough to be significant. Under Louisiana law, if the obstruction on the right of way is of such a nature as might reasonably warn the trainmen that the motorist cannot see, it is the trainmen's duty to sound a timely warning. *Smith v. Texas and Pacific Railway Company, supra; Texas and Pacific Railway Company v. Watkins, supra; Browne v. Texas and Pacific Railway Company*, 193 So. 511. Although from her vantage point inside the automobile with its limited upward range of vision, Mrs. Laborde could not see the train due to the grass and weeds, the locomotive crew admitted that they could see her automobile from their elevated and unobstructed vantage point. The Court of Appeals improperly isolated the existence of visual obstruction from the failure to sound a warning in absolving respondent from fault. Hence while it has been held that trainmen may assume that a motorist approaching a crossing will stop and that there is no requirement that a warning be sounded at a private crossing, they may not legally nor conscionably refrain from sounding a warning when they can see that the motorist cannot see the train.

The only appellate decision cited by the Court of Appeals which does not fall into one of the above distinguishing categories is *Illinois Central Railroad Company v. Leichner*, 19 F. 2d 118. It involved a jury verdict approved by the district court, but there the Court of Appeals, apparently both feeling that an unjust result was reached in the district court, yet appreciating its limited fact-reviewing power, remanded the case for new trial and did not attempt to instruct a verdict from a position so far removed from the presentation of the evidence. Petitioners are mindful that it is within the power of the Court of Appeals to render or direct definitive judgment in appropriate cases. But it is significant that of all the cases cited which are in any manner analogous, only one involved reversal of an approved jury verdict, and there no definitive judgment was directed.

The Court of Appeals failed to attach any significance to the approval of the verdict by the district judge and cited as controlling a case wherein the district judge disapproved the verdict. *Brinson, supra.*

In reviewing the propriety of a district judge's direction or setting aside of a verdict, the appellate court itself is not exercising any power to review facts strictly speaking. Instead it is approving or disapproving the exercise of such power which lies peculiarly in the trial judge. Conversely, where the trial judge has exercised supervisory discretion in favor of the verdict, the jury's decision is thereby greatly strengthened and entitled to great weight.[17]

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[17] "Ordinarily, the direct supervision of verdicts is in the sound discretion of the trial court and is not reviewable on appeal; and a verdict approved by the trial court, if without legal error and supported by the evidence, is conclusive on appeal.

Ordinarily, a question as to the creditability, weight and value of the evidence is primarily for the jury, as discussed *supra* sec. 1649, and secondarily for the trial court; and, in the absence of a clear abuse of discretion, is not, on appeal, a matter of review. In the absence of some

(Continued)

The Court of Appeals failed to consider the effect of the doctrine of proximate cause. If it be conceded *arguendo* that the essential facts were undisputed, the fact issues in a case of this sort do not thereby automatically become converted into legal issues. It was yet within the province of the jury to determine in the light of all legitimate inferences raised by the evidence whether Mrs. Laborde's negligence proximately contributed to the accident. Where proximate causation is involved, given facts do not inevitably lead to a fixed legal result.

Certiorari should be granted, not merely to correct an error by the Court of Appeals but to correct an abridgement of a fundamental constitutional right. The instant case is representative of the entire class of railroad negligence actions wherein the courts, trial and appellate, have sought to impose a more onerous burden of proof on plaintiffs and to relieve defendants of the burden of proving contributory negligence. This shifting of the burden of proof notwithstanding the jury's verdict is found in no other area of negligence law. As this Honorable Court has reinforced the guarantees of the Seventh Amendment repeatedly and forcefully in numerous Jones Act and FELA cases in recent years, it is in the public interest that such guarantees be re-emphasized in simple negligence actions and the principle of the *Pokora* case be re-established in railroad crossing cases.

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[17] (Continued)

imputed error of law or legal inference arising in connection therewith, the direct supervision of verdicts is in the sound discretion of the trial court, and is not reviewable on appeal. The fact that the trial court deliberately considered the evidence before judgment and approved the verdict is always a circumstance of great weight in determing whether a verdict shall be set aside on appeal for insufficiency of the evidence to support it, and in cases of doubt this circumstance will always be of controlling weight. In accordance with this principle the general rule is well settled that, where the verdict has been approved by the trial court, a court of review will not disturb the verdict on account of the insufficiency of the evidence. * * *" 5A C.J.S., Appeal and Error, sec. 1653, p. 407

## CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

Camille F. Gravel, Jr.

Camille F. Gravel, Jr.
*Counsel for Petitioners*
611 Murray Street
Alexandria, Louisiana

## CERTIFICATE

I certify that a copy of the above and foregoing petition for Writ of Certiorari has been served upon counsel for respondent, Frank H. Peterman, by depositing a copy of same in the United States Mail, with first class postage prepaid, addressed to him at his office, 909 Sixth Street, Alexandria, Louisiana.

Alexandria, Louisiana, this 6th day of November, 1958.

Camille F. Gravel, Jr.

Camille F. Gravel, Jr.

## *APPENDIX A*

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LOUISIANA REVISED STATUTES OF 1950, TITLE 45, SECTION 563:

§ 563. Motorist's duty to stop at crossing, exemptions

No person shall drive or propel any automobile or other motor driven vehicle upon the intersection of a railroad track and a public highway or municipal street at grade crossing without first stopping at a distance of not less than ten feet nor more than fifty feet from the nearest track and looking for approaching trains.

In the trial of all actions to recover personal injury or property damages sustained by any driver of such motor driven vehicle by collision of his vehicle and a train in which action it may appear that the driver violated this Section, the question of whether the violation was the sole or proximate cause of the accident and injury is for the jury to determine regardless of the penalizing feature of R.S. 45:564. That the violation of this Section shall not affect recovery for damages and the question of negligence or violation shall be left to the jury. Furthermore, the contributory negligence statutes of Louisiana shall apply in these cases as in other cases of negligence.

This Section shall not apply to automobiles or other motor driven vehicles of any municipality, when responding to fire alarm, or to the automobiles or other motor driven vehicles of the police department of any municipality when responding to an emergency call, or to motor driven ambulances when responding to

an emergency call. Nor shall this Section apply where crossings are provided with a flagman, and the signal to proceed has been given by the flagman, or where gates are provided and the gates are open.

## APPENDIX B

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA, ALEXANDRIA DIVISION, ON RESPONDENT'S MOTIONS FOR DIRECTED VERDICT OR NEW TRIAL.

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IN THE
UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA

ALEXANDRIA DIVISION

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CIVIL ACTION NO. 5454

MRS. GLADYS MAYEAUX LABORDE AND DALTON L. LABORDE, INDIVIDUALLY AND AS HEAD AND MASTER OF THE COMMUNITY OF ACQUETS AND GAINS
VS.
THE TEXAS AND PACIFIC RAILWAY COMPANY

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| FOR PLAINTIFFS | Messrs.<br>Gravel, Humphries, Sheffield and Mansour<br>611 Murray Street<br>Alexandria, Louisiana<br><br>John Ab Boatner<br>Bunkie, Louisiana |
| FOR DEFENDANT | Frank H. Peterman<br>909 Sixth Street<br>Alexandria, Louisiana |

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HUNTER, JUDGE:

Alleging that Mrs. Laborde's injuries resulted from the proximate negligence of defendant railroad, Mr. and Mrs.

Laborde brought this action against the railroad. The suit is based on negligence and is brought under Article 2315 of the Louisiana Revised Civil Code as amended.

The case was tried on its merits resulting in a verdict of the jury in favor of the plaintiffs as follows:

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|---|---|
| Mr. Laborde | $ 2,873.00 |
| Mrs. Laborde | 17,127.00 |

At the close of plaintiffs' case and at the close of all the evidence, defendant filed motions for directed verdicts. Acting under Rule 50, 28 U.S.C.A., the Court denied the motions and submitted the case to the jury, subject to a later determination of the legal issues involved.

On June 28, 1957, subsequent to the trial and verdict, defendant filed a timely motion to set aside the verdict and to grant defendant a judgment notwithstanding same. On the same day, defendant filed an alternate motion for a new trial. The railroad contends it should have had an instructed verdict, both because of the abscence of negligence on its part and because of contributory negligence as a matter of law on the part of Mrs. Laborde.

The law applicable to the pending motions has been well set out by the Fifth Circuit Court of Appeals in a case considered on appeal from the Western District of Louisiana (Judge Benjamin C. Dawkins, Sr., trial judge). The language and citation follow:

> "As this court has pointed out, a motion for a directed verdict or for a judgment notwithstanding the verdict can be granted only when there is no evidence, which, if believed, would

authorize a verdict against the movant, while the district judge may grant a new trial when he thinks the verdict is wrong, though supported by some evidence. Marsh v. Illinois Central RR Co., 5 C.C.A., 175 F. 2d 498, 500." Audirsch v. Texas & Pacific Ry. Co., 5 C.C.A., 195 F 2d 629, at page 630."

The question is one of law only: Is there evidence which, if believed, would authorize a verdict against defendant?

The Court has been favored by an exceedingly able, instructive and informative brief filed by defendant's counsel in which a large number of Louisiana cases have been cited. A careful reading of these cases reveals, as in other fields of negligence, exactly similar facts in more than one case are practically non-existent. Once negligence or the absence of negligence represents a conclusion or finding based upon all the relevant facts in a given case, it is obvious that since a single relevant fact appears in one case which does not appear in exactly the same way in other case, the conclusion in the one will not necessarily be the conclusion in the other. In the study of Louisiana cases, it must be remembered that Louisiana appellate courts review judgments of the lower courts on both questions of fact and law. Hence, in apprising decisions of the Louisiana courts, only their decisions on questions of law are applicable in the federal courts in situations where, as here, the fact-finding body has already acted.

In answer to specific interrogatories, the jury found:

(1) Defendant guilty of negligence proximately causing the injuries received by Mrs. Laborde.

(2) Mrs. Laborde not guilty of proximate negligence.

Defendant is faced with the problem of demonstrating an all-inclusive negative on these issues. It must show that in all the record there is no evidence which, if believed, would justify the verdict. On the other hand, from the standpoint of plaintiff, the pointing out by page and line of specific evidence is all that is needed to prove the existence of some evidence on which the verdict could be authorized.

Considering the instant case in the light of the rule here stated and testing the evidence, as we must with all inferences most favorable to the jury's findings, we believe there was ample believable evidence from which the jury could have found defendant negligent in failing to maintain its right-of-way adjacent to the crossing so as to allow a motorist to see up and down the track.[1]

## PROXIMATE CAUSE

The adjective "proximate", as commonly used in this connection, is perhaps misleading. Since to establish liability it is not necessarily true that defendant's negligent act must be shown to have been the next or immediate cause of plaintiff's injury. The plaintiff's injury may more immediately have been caused by an act of the plaintiff bringing himself in contact with a dangerous situation resulting from defendant's negligence. *Marshall v. Nugent*, 1 C.C.A., 1955, 222 F. 2d 604. The question of whether or not negligence once established is a

[1] The evidence referred to is that of plaintiffs' photographs and the testimony of Mrs. Laborde, Mr. Bowman and Mr. Voorhies. It is negligence for a railroad to allow obstructions in the form of grass, brush, weeds, etc. to grow on its right-of-way so as to obstruct view of motorists approaching a crossing. *Guillot v. T. & P. Ry. Co.*, 8 La. App. 143; *Smith v. T. & P. Ry. Co.*, 189 So. 316.

proximate cause of the accident is a factual question for the jury to determine. We leave the question to the jury with the appropriate instructions, and this is done to obtain the judgment of the jury, reflecting as it does the earthy viewpoints of the common man—the prevalent sense of the community as to whether the casual relation between the negligent act and the plaintiff's harm is sufficiently close to make it just and expedient to hold the defendant accountable in damages. That is what we mean when we say the question of proximate cause is one of fact for the jury. It is true that in dealing with the question of proximate cause the trial judge has to make a preliminary decision as to whether the issues are such that reasonable men might differ on the inferences to be drawn. Exercising that judgment on the facts in the case at bar, the Court concludes that reasonable men could find that the negligence here was a proximate cause of the accident and resulting injuries of Mrs. Laborde.

## CONTRIBUTORY NEGLIGENCE

The presumption is that a person uses ordinary care. The burden of proving contributory negligence is defendant's. As a matter of law, does the evidence of plaintiff's failure to stop nullify a jury verdict—a necessary implication of which is that the plaintiff was not guilty of negligence which was a proximate cause of the accident? I think not. The applicable Louisiana law, as stated by the Fifth Circuit in *Illinois Central R.R. Co. v. Aucoin* (1952), 195 F. 2d 983, is:

> "Every automobile driver is necessarily guilty of some degree of inattention when he collides with a railroad train in broad daylight. But, whether such inattention amounts to negligence in the circumstances, and if so, whether that

> negligence, or intervening negligence on the part of the railroad company, or both, was the proximate cause of the collision, *is primarily a jury question.*"

The Louisiana Legislature has not been silent on the subject. Louisiana Revised Statutes 45:563, which re-enacts a 1924 statute relative the violation of the duty to stop, look, and listen at public railroad crossings,[2] provides in pertinent part:

> "The question of whether the violation was the sole or proximate cause of the accident and the injury is for the jury to determine, regardless of the penalizing feature of R.S. 4 564. That the violation of this section shall not affect recovery for damages and the question of negligence or violation shall be left to the jury."

Innumerable cases have been cited somewhat similar to the instant case wherein the railroad has been freed of liability because of contributory negligence. The decisions in most of those cases did not involve a jury finding that the deceased was free of contributory negligence which was a proximate cause, but involved findings of fact by a Louisiana State Judge in accordance with conclusions reached. Such questions of proximate cause and contributory negligence are the very stuff of which the ordinary man is compounded.[3]

Specifically, the Court believes that there existed a basis for the following findings of fact based on the evidence and or permissive inferences therefrom to sustain the verdict of the jury;

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[2] Here, the crossing was a private one and the regulatory statutes are not applicable but are illustrative of the State's public policy.

[3] *Texas and Pacific R.R. v. Watkins*, 5 C.C.A., 243 F. 2d 171; *Georgia R.R. v. Otts*, 5 C.C.A. #16, 341, June 19, 1957.

(1) That the railroad failed to maintain its right-of-way adjacent to the crossing so as to allow a motorist to see up and down the tracks; that this failure constituted negligence which was a proximate cause of Mrs. Laborde's injuries.

(2) That the negligence, if any, on the part of plaintiff, was not a proximate cause of the accident.

Accordingly, the motions for directed verdicts and for judgments notwithstanding same are denied.

## MOTION FOR A NEW TRIAL

The Court appreciates the clear distinction between its power to set aside a verdict and grant a judgment notwithstanding same and its power to grant a new trial. *Marsh v. Ill. Cent. RR Co.*, 5 C.C.A., 1949, 175 F. 2d 498; *Aetna Casualty & Surety Co. v. Yeatts*, 4 C.C.A., 1944, 122 F. 2d 350, 351; *Montgomery Ward & Co. v. Duncan*, 1940, 311 U.S. 243, 61 S. Ct. 189, 85 L. Ed. 147. This authority to grant a new trial must be exercised cautiously, for if only those verdicts were to be undisturbed with which the trial judge concurred, trial by jury would then become an artificial formality. The question is not what I would have done had I been a member of the jury, or even what a Louisiana trial court, sitting without a jury, would have done; or even what the Supreme Court of Louisiana would have done in reviewing both the law and the facts. The question is: Is the verdict clearly or decidedly against the weight of the evidence? I do not think so. I am not free to re-weigh the evidence and set aside the verdict and grant a new trial merely because I might feel that other results are more reasonable.

In exercising discretion and in reviewing the evidence, the Court has decided to abstain from interfering with the verdict, because I do think that the issues here involved are issues upon which reasonable minds might differ as to the conclusions to be drawn from the conflicting facts presented.

Accordingly, the motion for a new trial is denied.

THUS DONE AND SIGNED in Chambers at Lake Charles, Louisiana, on this the 9th day of December, 1957.

(Sgd.) EDWIN F. HUNTER, JR.
UNITED STATES DISTRICT COURT

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## OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT ON APPEAL FROM THE UNITED STATES DISTRICT COURT.

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 17174

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TEXAS & PACIFIC RAILWAY COMPANY,
Appellant,

*versus*

MRS GLADYS MAYEAUX LABORDE, ET AL.,
Appellees.

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*Appeal for the United States District Court for the Western District of Louisiana.*

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(June 30, 1958.)

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Befort HUTCHESON, Chief Judge, and JONES and WISDOM, Circuit Judges.

HUTCHESON, Chief Judge: The suit was for damages resulting from a collision occurring at a railroad crossing of a dirt and gravel road, known os the O'Neal crossing, between plaintiff's automobile and a freight train belonging to, and under the control of, defendant.

The claims of negligence were: maintaining the right-of-way at and around the crossing in such a manner that the view of the track was obstructed and persons using the gravel road could not see up and down the tracks;[1] the failure to operate the train at a reasonable speed; the failure to sound timely warning signals; and the failure to slow the train when the danger of a collision appeared.

The defenses were: a denial of the claims of negligence; and allegations, that the collision was not proximately caused by any fault on its part but by the negligence of plaintiff, and that if defendant was negligent in any particular, plaintiff was guilty of contributory negligence barring her recovery.

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[1] In regard to this ground of negligence, these are the allegations of par. 7 and 12 of the complaint:

"7. Mrs. Laborde at all times exercised due care and made every effort to ascertain whether it was safe to proceed onto and across T & P's tracks; *her line of vision up and down the track was impaired, however, by the presence, on either side of the dirt road, of a thick profusion of high grass and weeds and by fence posts, telephone poles, wires, and high barrier-type cattle guard fences on either side of the intersection, making it impossible for her to see for any appreciable distance to the right or left.*" (emphasis supplied)

"12. *Being unable to perceive the approach of the train from the south, hearing no audible warning whistle or signal, seeing no visible warning or signal, and assuming that it was safe to do so, Mrs. Laborde drove her automobile onto T & P's tracks in an effort to cross same.*" (emphasis supplied)

At the conclusion of the evidence,[2] which was not substantially in dispute, defendant moved for an in-

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[2] The residence occupied by Mrs. Laborde and her husband at the time of, and for some months prior to, the accident was west of U.S. Highway #71 and adjacent thereto. The main line of the Texas and Pacific Railway Company runs approximately north and south, parallel to and east of said Highway for some ten miles south of the Laborde property. The railroad track is about 85 feet from the highway. The surrounding area is open country.

On the morning of Aug. 11, 1955, at about 9:30 A.M., Mrs. Laborde, who was familiar with the crossing, having crossed it three or four times previously, got in the family car to go to the O'Neal home located on the east side of the railroad track for the purpose of using the telephone, according to her testimony. In order to reach her destination, she had to enter Highway #71, turn to the left and travel north 224 feet to its intersection with a gravel road, then turn right on this road and cross the main line of defendant's railroad tracks. Exhibit D-9 shows accurately the surroundings at the crossing. U.S. Highway #71 is shaded in blue, the roadbed of the Railway Company is shaded in red, the road leading out of the Laborde premises and the gravel road leading from the highway to the O'Neal residence are shown in yellow on said Exhibit.

The weather was clear. The railroad track was on an elevation some four feet above the surface of the ground. At the time Mrs. Laborde entered Highway #71 a long freight train of the Texas and Pacific Railway Company was approaching the crossing. There were 154 cars in the train which was more than one mile long.

Mrs. Laborde turned off the Highway onto the gravel or O'Neal road without stopping at the intersection. She continued toward the crossing without stopping and reached it at the same time as the locomotive.

According to her testimony: She drove her 1949 model Chevrolet automobile out of the driveway of her home, turned left (or toward the north) and drove along the highway for approximately 224 feet to a dirt and gravel road known as the O'Neal crossing road. She drove this distance at an estimated average speed of 15 miles per hour. When she got to the O'Neal road, she turned right and proceeded along the road in an easterly direction toward the railroad tracks at a slower rate of speed, approximately 12 miles per hour. She knew the crossing was there. She had driven over it maybe three times previously. When she reached a point where a slightly steeper part of the incline in the road starts, she came to almost a complete stop and shifted into second gear. The bottom of the steeper incline was measured by appellees as approximately 30 feet from the tracks. The railroad civil engineer measured the bottom of the incline as being 31 or 32 feet from the tracks. The railroad's right-of-way line was 26 feet from the tracks. While at the bottom of the incline she looked up the track in both directions. She neither saw nor heard the approach of a train. She then proceeded up the incline toward the tracks in low gear at "about ten miles" per hour. When she got a few feet from the tracks, she heard a train whistle for the first time. She took her foot off the accelerator and tried to stop but was unable to do so before the front end of her automobile was in the tracks. The locomotive struck the right front of her automobile.

structed verdict on the grounds set out below,[3] and the court, denying the motion but without prejudice to its reconsideration after the verdict, submitted the case to the jury on a charge, to which no objection was made. There was a verdict for plaintiff and a motion to set aside the verdict of the jury and enter jurgment for defendant, and, in the alternative, for a new trial, and the court, giving his reasons for so doing in an opinion filed by him, denied both motions, and entered judgment on the verdict for the plaintiff.

Appealing from the judgment, defendant is here assigning, as its chief grounds, that (1) no actionable negligence on the part of the defendant was shown, and (2) if there was, plaintiff was contributorily negligent. A subordinate ground assigned is that the court made various rulings which were erroneous and prejudicial to defendant.

Pointing out that the only ground of negligence adverted to by the trial court in his opinion was the failure of the defendant "to maintain its right-of-way adjacent to the crossing so as to allow a motorist to

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3 "(1) The evidence shows that defendant was not guilty of any fault or carelessness which was a proximate cause of the accident.

"(2) The evidence shows that defendant did not violate an legal duty or obligation it owed plaintiff at the time of the accident

"(3) The evidence shows that the proximate cause of the accident was the fault and negligence of the plaintiff herself.

"(4) The evidence shows that it was physically impossible for defendant to avoid the collision after plaintiff put herself in a position of peril.

"(5) Even if there was any negligence on the part of the defendant which was a proximate cause of the accident, nevertheless the evidence shows that the plaintiff was guilty of contributory negligence in failing to keep a proper lookout; in failing to see and hear an approaching train; in failing to stop before going on the crossing at a time and place where she could and should have seen the train; in driving her car into the path of an approaching train which should have been clearly visible to her; in failing to stop, look and listen at a time and place where said precautions would have been effective; and in failing to use the care and precaution for her own safety required by law."

see up and down the track", and arguing that, under the undisputed evidence, including that of the plaintiff herself, the fact that weeds and grass obstructed the view was not a proximate cause of plaintiff's injuries, appellant insists that the judgment must be reversed and here rendered, both for that reason and because of the contributory negligence of the plaintiff.

In demonstration of the truth of these contentions, appellant then puts forward in a brief, distinguished as well by its range as by its specificity, a series of propositions with in each instance a reference to, and in most a quotation from, a decision or decisions of the Louisiana Courts, with now and then a decision of a federal court, deemed precisely in point and authoritative or closely in point and persuasive. In doing this, however, it recognizes that almost no case is in its facts a precise replica of another and that each court in each case must, under the rules of right reason which govern the determination, determine and decide whether under the particular facts of that case the issue of negligence or contributory negligence in that case presents a question of law for the court or of fact for the jury.

Appellees concede, as they must, that, as decided by this court in *Brinson v. I.C. Ry. Co.*, 241 F(2) 494, while negligence and contributory negligence are ordinarily issues for the jury, where there is no substantial conflict in the evidence and when, from undisputed and indisputable facts, reasonable men in the exercise of right reason and fair judgment could draw only one conclusion, the court may properly withdraw them from the jury. Standing firmly, however, on the opinion and decision of the district judge and on the cases cited and relied on by them, including particularly *Henwood*

*v. Wallace*, 159 F(2) 263, Judge Sibley dissenting, and *Texas & Pac. Ry. Co. v. Watkins*, 243 F(2) 171, Judge Tuttle dissenting, appellees insist that under the facts of this case the issues were not for the court but for the jury.

For the reasons and upon the authorities hereafter set down, we agree with appellant, we disagree with appellees and the district judge. Because, however, of the very profusion and, we must add, confusion in the decisions dealing with this troublesome matter, fact or law, before proceeding to the precise demonstration of our view, that in this case the questions presented are of law and not of fact, we think some preliminary generalizing will not be amiss.

The civilian, with his code and his trial judge, looks on the terms matter of fact and matter of law as little better than senseless jargon. We, brought up in its spirit and nurture, know that matter of fact and matter of law are the very stuff of which the common law is made, and that negligence suits have furnished natural battle grounds for knock down and drag out fights over fact and law.

Whether the maxim, "ad quaestionem juris respondent judices, ad quaestionem facti respondent juratores", a favorite with Coke, was borrowed by him from Bracton, or was his own confection, is not material for our purpose. It is sufficient to say of it that, never true if taken absolutely, it was never intended to be, it was never, so taken, and that in outline and in effect it states the great general rule that the regular common law mode of trying questions of fact is by jury. Said Coke:

"The most usual trial of matters of fact is

> by twelve such men; for ad quaestionem facti non respondent judices; and matters in law the judges ought to decide and discuss; for ad quaestionem juris non respondent juratores."

In saying this, he made it plain that definition must go out of the window and that in determining what is matter of fact and what is matter of law, we must look alone to what judges have done, are doing, probably will do. In short, matters which the judges are supposed to settle and determine are matters of law, all others are matter of fact for the jury.

This discrimination between matter of fact and law is not a mere product, it is of the essence, of the jury system. Its progress and development are the result of efforts on the one hand to bring certainty into the law by declaring and giving effects to standards rather than leaving every case to be variantly decided by varying juries, and, on the other, to decry these efforts and bring them to naught, as making for a "delusive exactness".[4] Our wisest, indeed our only satisfactory course, therefore, is to take matter of law and matter of fact as the decisions have worked, and are working, them out, troubling ourselves not at all with the baffling attempt to determine and define their philosophical content and meaning, viewed abstractly and as disassociated from the decisions.

Chamberlayne, in his Modern Law of Evidence, Vol. 1, cc. 2 and 3, agreeing with the view here taken, that

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[4] Quanah A. & P. Ry. v. Gray, 63 F(2) 410 (C.C.A. 5th, 1933), contains an interesting discussion of the state of mind which, while it depreciates delusive exactness in constitutional questions, seeks to attain it at common law by gradually eliminating jury verdicts and setting up in lieu thereof standard fact patterns and thus determining cases as matter of law by the conformity of their facts with these patterns. Cf. Baltimore & O. R. v. Goodman, 275 U.S. 66 (1927), but see Pokora v. Wabash, 292 U.S. 98.

it is sufficient to say that, as used in the trial of cases, law is the standard or rule which the court must apply to the facts, and fact is every other matter which the judge must not, and the jury therefore must, determine, makes a valuable contribution. He points out that the separation of the judicial tribunal for the trial of cases into its two component parts of judge and jury is the most salient and fundamental feature of English jurisprudence, and that it is this division of function which has made it necessary to segregate matter of law from matter of fact. He makes it clear, as others do, that what is law and what is fact have been, and will continue to be, a matter of growth and change as the prevailing climate of opinion narrows or broadens the field of certainty. Completely rejecting the idea that a jury authorized to return a general verdict may be said to have a right to judge of both law and fact, he points out that it has the power to disregard the law as given in the instructions of the court; it does not have the right to do so and then itself adjudge the law. "This power instead of being called a power to judge of the law should rather be regarded as a power to set aside the law in a given instance, and it is believed that the popular affection for the system of trial by jury lies largely in the fact that this system involves a popular prohibition upon the execution of the law in hard cases." Thompson, Trials (1889) 2133.

This struggle between those who wish the law to be certain and fixed and each case to be decided as matter of law by the judge, and those who wish it human and flexible and each case to be decided as matter of fact by the jury, between the certainers and the uncertainers, between precedent and free decision, between law and fact, has put society and the Judge as Adminis-

trafor[5] hard to it to develop fair and workable trial rules which, while giving effect to controlling law, leave fact questions to the jury. The chief of these rules are (1) rules of evidence; (2) rules for the construction of documents, statutes and other writings; (3) rules for the instruction and the guidance of the jury on the law of the case; and (4) the direction of a verdict under the rule of right reason on an issue or on the whole case where the evidence is without probative force.[6]

Proceeding now to the demonstration that, as matter of law, no case of actionable negligence was made out, we begin with the proposition that in Louisiana there is no presumption in a crossing collision that the defendant was negligent, and it was incumbent on the plaintiff to prove that it was,[7] to follow it with a showing that plaintiff's charge, that the company was negligent in operating its train at and near the crossing at too great a speed, is without foundation. The evidence establishes that the train's speed was not in excess of fifty miles. There is no statute or regulation in Louisiana limiting the speed of trains at the point of the accident, and the jurisprudence of Louisiana is uniform to the effect that in the open country any speed consistent with the safety of the train is permissible. *Sullivan c. Yazoo & Miss. Valley*, 8 So(2) 109; *Guidry v. T. & N. O.*, 56 So(2) 611; and *Lewis v. Thompson, supra.*

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[5] Maryland Cas. Co. v. Reid, 76 F(2) 30.

[6] Chamberlayne, The Modern Law of Evidence, Secs. 120a, 122, 145, 148, 149.

[7] "Negligence is the breach of a legal duty or obligation. It, or the facts upon which it is based, must be pleaded and proved, it is never assumed, presumed or predicated upon mere inferences." Lewis v. Thompson, 47 Fed. Supp. 435.

"Courts must scrupulously retrain from accepting speculation and possibility as an adequate basis of recovery." Windham v. Williams, 18 So(2) 854. Cf. Thrash v. Continental, 6 So(2) 75.

Another claim made by her, that the engineer did not sound the whistle soon enough, is disproved in law by the rule in Louisiana as authoritatively laid down in *Guidry v. T. & N. O.*, 20 So(2) 637: "A railroad train is not required to sound a warning for a private crossing in a rural area, or to diminish its speed for such private crossing."; and reaffirmed in *Guidry v. T. & N. O.*, 56 So(2) 611. It is disproved in fact by the testimony of three members of the train crew and by Mr. O'Neill, that the engineer began to blow the whistle when Mrs. Laborde first turned off the highway to enter the gravel road, and this is not disputed by the positive testimony of any witness.

Of her claim that those on the locomotive failed to make any effort to reduce the speed of the train when they saw Mrs. Laborde enter the gravel road driving toward the crossing, it is sufficient to say that the uniform jurisprudence of Louisiana as is that of most other jurisdictions, is that the operators of a train have a right to assume, unless they have evidence to the contrary, that persons approaching a track, before attempting to cross it, will, as it is their duty to do, stop and make sure that it is safe to do so.

In *Levy v. N.O. & N.E. Ry. Co.*, 20 So(2) 559, a case almost identical with this one, the court said:

> "If Mrs. Levy's [Mrs. Laborde's] car slowly approached the track * * * surely they were not negligent in believing it would be brought to a stop before reaching the track. That is what happens at almost every crossing, urban or country, every time a train approaches. The crew sees many automobiles driving toward the crossing, and they assume as they are

> justified in doing, that each car is going to stop."

Cf. *Hanks v. Ark. & La. Ry.*, 62 So(2) 139, where it is said:

> "The only knowledge of danger came at the last instant when defendant's brakeman observed that the driver was not going to stop. *Members of a train crew are not negligent in assuming that the operator of an automobile approaching the track will bring the vehicle to a stop and there is no negligence even when they persist in such a reasonable belief until it is no longer in their power to avoid the accident.* Bordenave v. T. & N. O. Ry. Co., 46 So(2) 525." (Emphasis supplied.)

When as a last resort, plaintiff falls back upon her claim of negligence in permitting grass and weeds to grow upon the right-of-way to such heights that at a point some thirty feet from the tracks, where the plaintiff slowed down to look for an approaching train, she was prevented thereby from seeing it, no better case of negligence is made out, for, as will be pointed out more fully in connection with plaintiff's contributory negligence, no one testified, it is not even claimed, that if plaintiff had come to a stop at or near the tracks, as she did not do, she would not have had a full view of the train and thereby avoided the injury. Her claim, therefore, that defendant, in permitting weeds and grass to grow, was guilty of negligence which proximately caused the injury, falls. For, as we have shown above, if plaintiff, as the train crew had a right to assume she would do, had come to a stop before trying to cross or had even proceeded slowly enough, the col-

lision would not have occurred, and thus it was her negligence in failing to do this, and not the presence of the weeds which proximately caused the injury. Cf. *Stewart v. Kroger*, 21 So(2) 912, and *Brown v. Louisville*, 235 F(2) 204 (5 Cir.)

We thus reach the question, whether, upon the undisputed evidence, indeed upon plaintiff's clear admissions, and under the settled law of Louisiana, it must be held that plaintiff's negligence contributed in some degree to the collision, to say that we think it inescapable that it must be, and that it presents in fact and in law an insuperable barrier to plaintiff's recovery.

When plaintiff came out of her home onto the highway the train was not more than 1000 feet from the crossing, otherwise it could not have reached the intersection at the same time she did. Nevertheless, with all the open view which she had, she went on without looking until she came to a point in the road at the bottom of what she called the steep rise to the tracks and thirty feet from the crossing There without stopping the car and, though, as she said, she couldn't see anything on account of the grass she took a hasty glance to the right and left and not seeing or hearing any train and proceeding without stopping or looking any further, she drove up the incline in second gear at a speed from ten to twelve miles an hour and onto the tracks where she was struck by the oncoming train. The courts in general[*] and of Louisiana in particular have dealt frequently, specifically, and pointedly with situation of this kind. *Illinois Central v. Leichner*,

[*] 5-A Am. Jur., "Automobiles and Highway Traffic, Sec. 331: "Where the vision of the driver of an automobile is obstructed for any cause, the law requires that he exercise care commesurate with the situation and requires him to proceed with more caution than where he has unobstructed vision."

19 F(2) 118; *Teston v. Thompson*, 77 Fed. Supp. 823; *Barnhill v. T. & P. Ry. Co.*, 33 So. 63; *Hutchinson v. T. & P.*, 33 So(2) 139; *Stelly v. T. & N. O.*, 49 So(2) 640. In the Hutchinson case, where it was claimed that the view was obscured by crossing signs, telegraph poles and weeds and bushes, the court stated:

> "Even if the weeds had obscured plaintiff's view, as he claims, his duty to stop, look and listen, was the more incumbent upon him."

while in the Stelly case, the court said, with reference to a crossing where it was claimed that the weeds had grown to such height as to obscure the view of an approaching train:

> "Residents of the vicinity of the crossing testified that they paid no attention to the weeds alongside the track, and did not know how tall they were. We feel that the weeds were of such a height and nature as to be of little consequence. Had they so obstructed the view, as is alleged by plaintiff, then Stelly should have exercised more care in traversing the crossing. Quoting from Hutchinson v. Texas & N.O. (supra):
>
> > 'Even if the weeds had obstructed plaintiff's view as he claims, his duty to stop, look and listen was the more incumbent upon him.' Perrin v. New Orleans Terminal Co., 140 La. 818, 74 So. 160."

This court, as it is required to do in Louisiana cases, has with substantial uniformity followed their lead. Cf. *Shell Oil Co. v. Slade*, 133 F(2) 518 and *Brinson v. Ill. Central RR Co.*, 241 F(2) 494.

In Brinson's case, which involved a claim that a

crossing was obstructed and which is in principle indistinguishable from this one, the court, in dealing with an appeal from a judgment on an instructed verdict for the defendant, said:

> "Applying these principles to the undisputed facts as disclosed by this record, we think it plain that the driver, in the exercise of ordinary care for his own safety, could have easily stopped the car, which was moving at a relatively slow speed, after passing the north edge of the farm machinery and before reaching the main-line track. The greater the difficulty of seeing and hearing the train as he approaches the crossing, the greater caution the law imposes upon the motorist. Barnhill v. Texas & P. R. Co., 109 La. 43, 33 So. 63. Cf. Guidry v. Texas & N.O. R. Co., La. App., 56 So(2) 611; Stelly v. Texas & N.O. Co., La. App., 49 So(2) 640. And where, as here, the driver's view of the tracks was obstructed he was required under the Louisiana law to proceed only with the greatest caution."

If, contrary to common experience and to the evidence of the plaintiff's witness, O'Neal, the jury could believe that the grass was so high at the point where she looked as to obstruct plaintiff's view of a train which, running on rails some four feet above the level of the ground, was itself some 15 feet above the rails, then, under Louisiana law, plaintiff was required to take the further precaution of looking for a train where the looking would be effective, that is, *at a place and under circumstances where she could see it, and not to proceed across the track without doing so.*[9]

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[9] Northern Pac. Ry. Co. v. Bacon, 91 F(2) 173; Lewis v. Thompson, 47 Fed. Supp., 435; Teston v. Thompson, supra, Young v. La. Western Ry. Co., 95 So. 511; Dardene v. T. & P., 127 So. 458.

It is greatly significant that the Louisiana courts have uniformly held that where, as here, a driver knows of the presence of a railway track, lives within a short distance of it, and has several times driven over it, it is not sufficient for him to say that he did not see a train coming when he tried to cross without stopping or at least looking at a place where he could see it. In short, if the evidence is such as to compel the view that he could reasonably have seen it he is held to have seen it. *Sullivan v. Locke*, 73 So(2) 616; *Matthews v. T. & N. O.*, 45 So(2) 547; *Wyche v. Brian*, 28 So(2) 143; *Vigilant v. Lumbermens*, 85 So(2) 87.

As to the cases on which appellee relies, we think a word or two will suffice to show that none of them are authoritative, indeed persuasive, in her favor. *Lipscomb v. New Star*, 5 So(2) 41, a guest case, did not involve questions of simple negligence at all. What was said there had to do entirely with whether, as matter of law, wanton or willful disregard of the rights of others had been proven. *Henwood v. Wallace*, 159 F(2) 263, one judge dissenting, was a case in which the proof showed that the railroad train was running at a reckless rate of speed and failed to give any warning. The majority there held merely that the rule in Louisiana on the subject of contributory negligence was not made more stringent by the Louisiana Highway Regulatory Laws because they have not been so construed by the Appellate Courts of Louisiana and the Act of 1924 expressly enacted a contrary rule.

*Illinois Central v. Aucoin*, 195 F(2) 984 laid down no peculiar or new rule of law. The court merely held that under the facts this was not a case for the direction of a verdict.

*Kansas City Southern v. Wiggins*, 234 F(2) 128,

written by the same panel that wrote *Brown v. L. & N. Ry Co.*, appearing in the same volume at p. 204, contains nothing giving aid or comfort to appellee's claim. Stating, "Applying Louisiana jurisprudence, we hold motorists to strict standards of care as they approach railroad crossings which they know or ought to know clearly are there", and setting out all the correct principles which, under Louisiana law, govern cases of this kind, the opinion convincingly demonstrates that under its facts, one of the most important of which was that there was negligence on the part of the railroad company and that the plaintiff did not know that he was approaching a crossing, the court held that the case was not one for an instruction but one for the jury. It is true that in *T & P v. Watkins*, 243 F(2) 171, Judge Tuttle dissenting, at first blush the majority opinion seems in its application to the facts to be out of line with the principles governing the application in Louisiana of the rule of contrlbutory negligence in cases of this general kind. Nothing in it, however considered, can be taken as undertaking to state a general rule contrary to that stated and applied herein and in the uniform decisions of the Louisiana courts and of this court, including particularly *Brinson v. Ill. Central*, 241 F(2) 494, which we think conclusive of this case, and which the court in the Watkins case could not, and did not attempt to, overrule.

Finally, appellee's reliance on *Ruhl v. Mo. Pac. RR. Co.*, 304 SW(2) 16, will not at all do, for as there appears, the collision in that case was one in which both driver and guest were killed, and there was no evidence as to what was done by the driver before crossing the track. The court there merely held that since this was so, "There is no evidence as to what they did and whatever the rule may be elsewhere, Ann. 84 A.L.R.

1221, it is presumed in Kansas, in the absence of evidence, that the deceased driver and occupant looked and listened for approaching train before venturing upon the crossing."

As an examination of the decisions of Louisiana, as well as of the note in 84 A.L.R. will show, this rule does not apply in Louisiana, and, if it did, the plaintiff in this case having testified fully as to what she did, the rule would not apply even in those jurisdictions where it would otherwise prevail.

The judgment is REVERSED and the cause if REMANDED with instructions to direct a verdict for the defendant.

A true copy

Test: /s/ EDWARD W. WADSWORTH
EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit
New Orleans, Louisiana.

(SEAL)

## JUDGMENT.

Extract from the Minutes of June 30, 1958.

TEXAS & PACIFIC RAILWAY COMPANY,

NO. 17174. versus

MRS. GLADYS MAYEAUX LABORDE, ET AL.

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby, remanded to the said District Court with instructions to direct a verdict for the defendant, Texas & Pacific Railway Company;

It is further ordered and adjudged that the appellees, Mrs. Gladys Mayeaux Laborde and Dalton L. Laborde, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

DEC 29 1958
JAMES R. BROWNING, CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM — 1958

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## No. 302

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MRS. GLADYS MAYEAUX LABORDE, ET AL,
Petitioners,

*versus*

TEXAS AND PACIFIC RAILWAY COMPANY,
Respondent.

---

*On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.*

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## *BRIEF FOR RESPONDENT IN OPPOSITION.*

---

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IN THE

# Supreme Court of the United States

OCTOBER TERM—1958

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## No. 502

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MRS. GLADYS MAYEAUX LABORDE, ET AL,
Petitioners,

*versus*

TEXAS AND PACIFIC RAILWAY COMPANY,
Respondent

---

*On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.*

---

## *BRIEF FOR RESPONDENT IN OPPOSITION.*

---

There is no justification for the issuance of a writ of certiorari in this suit for the reasons hereinafter set forth.

### *OPINIONS BELOW*

The opinion of the District Court is unreported as stated in petitioner's application for the writ, but the opinion of the Court of Appeals for the Fifth Circuit is reported in 257 F. 2d 587.

### *QUESTIONS PRESENTED FOR REVIEW*

The questions for review presented by petitioners are based on erroneous assumptions. Since the statement of a question presented is deemed under the Rules to in-

clude every subsidiary question fairly comprised therein, respondent will not attempt to restate accurately what the real questions are at this point but will discuss them in its argument.

## *STATEMENT OF THE CASE*

This suit grew out of a collision at a railroad crossing in the open country when an automobile driven by Mrs. Laborde was struck by a freight train of the Texas and Pacific Railway Company. Plaintiff and her husband were living at the time near the crossing on the west side of US Highway #71, less than 300 feet from the point where the accident happened. The main line of the Railway Company runs approximately north and south parallel to said Highway and is straight for some ten miles south of the crossing. The railroad track is about 85 feet from the Highway.

About 9:30 on the morning of August 11, 1955 Mrs. Laborde got in the family car to go to the O'Neal residence located on the east side of the railroad track. She had made the same sort of trip on previous occasions and was therefore familiar with the surroundings. In order to reach her destination, she drove her car on to Highway #71, turned to the left and travelled north 224 feet to its intersection with a gravel road leading to the O'Neal premises. She turned right on this road with the intention of crossing defendant's tracks. Exhibit D-9 filed in the record by respondent shows accurately the surroundings at the crossing.

The weather was clear. The railroad track was on an elevation four feet above the surface of the road. When Mrs. Laborde first entered Highway #71 a freight train of the Texas and Pacific Railway Company was

approaching the crossing from the south. There was nothing to interfere with her view of it at that time as she was facing the track when she drove out of her yard. When she reached the intersection of the Highway with the gravel road, she turned and drove toward the crossing, without stopping at the intersection. Except for slowing down momentarily when she was thirty feet from the crossing, she drove up on the track in the path of the approaching train in broad daylight. The train was made up of 154 cars and was more than a mile long.

In their bill of complaint plaintiffs charge the Company with negligence on numerous grounds, but in their application to this Court for certiorari, they rely only upon two grounds of alleged negligence. First, failure of the Company to maintain its right of way so as to allow an approaching motorist a view up and down the tracks; second, failure on the part of the locomotive crew to sound timely and effective warning when Mrs. Laborde was seen approaching the track. There is no substantial evidence to justify either of the above charges of negligence. The allegations are not only overwhelmingly refuted by the testimony of defendant's witnesses, but are also contradicted by the witnesses for plaintiffs.

As to the contention that weeds and grass along the edge of the gravel road interfered with Mrs. Laborde's view of a train, plaintiff's witness O'Neal, who had occasion to use the crossing practically every day, said he never had any trouble seeing a train. In answer to questions from the Trial Judge, he said that on the day of the accident he had crossed the track from both ways; that he could see a train coming from the south; that the conditions were similar to those at the time of the accident, and that he never had any trouble seeing a train when he went over this crossing. (R. 69-70-71-72)

As to the contention that the locomotive crew failed to blow the whistle before it reached the crossing, plaintiff was again contradicted by her own witnesses. Her witness O'Neal said there were several blasts of the whistle before he saw the train, and he saw the train before it collided with the automobile. (R. 53-54) The only other witness for plaintiff who saw the accident was Voohries. He heard the train blowing, looked up and saw it approaching the crossing and at this time he saw the automobile of plaintiff moving up the incline toward the track. (R. 92) Voohries had his back to the railroad track and the blowing of the whistle caused him to look around. At the time he looked toward the track, Mrs. Laborde's car was still moving toward the crossing even though she had to drive upgrade.

Plaintiffs filed in evidence a photograph marked P-21 taken by their witness Bowman. Bowman got down behind a bush at a corner where the fence along Highway #71 connected at right angles with a fence along the gravel road leading to the track. The picture he took speaks for itself and shows conclusively that even with the obstructed view to the lens of the camera resulting from the picture having been taken behind a bush, that a train on the tracks was plainly visible. Furthermore, under cross-examination Bowman admitted that he could tell there was a train by looking closely. (R. 112) This is exactly what the law in Louisiana requires of a motorist approaching a railroad crossing and it is a precaution which Mrs. Laborde failed to exercise.

## ARGUMENT

### I.

### QUESTIONS PRESENTED ARE BASED ON ERRONEOUS ASSUMPTIONS

We will first discuss briefly the questions presented in the petition for certiorari, which are astutely framed to imply errors by the Court of Appeals sufficient to warrant a review of its decision by the Supreme Court. Taking them up in the order in which they appear in the petition of plaintiffs we find:

(1) It is claimed that there is an irreconcilable conflict between the various panels of the Court of Appeals for the Fifth Circuit in Louisiana in railroad crossing cases. Respondent shows that the decisions are not irreconcilable as we will point out later herein under the heading "There Is No Conflict of Decisions".

What petitioners fail to realize is that each case must be decided on its own facts. The cases relied on by petitioners are not factually similar to those in the case at bar. As stated by the Louisiana Court of Appeals for the Second Circuit in *Slayter v. T & P Railway Company*, 182 So. 343,

> "However, no two cases are identical in their facts and, in a large measure, each case must be disposed of from its own peculiar facts." (p. 346)

See also *Richardson v. American Employer's Insurance Co.*, 32 So. 2d 108.

Assuming that there is a conflict in the Fifth Circuit regarding decisions relative to railroad crossing accidents in Louisiana, this does not mean that there is any question of federal law involved requiring a decision by

this Court. Ever since *Erie Ry. Co. v. Tompkins*, the federal courts have been required to apply the law of the state in this type of suit. There is presumed to be no federal jurisprudence in negligence cases of this kind. Reconciliations might be necessary if there were a conflict between two federal courts on the same question of federal law. This would be proper in order that there be uniformity of federal jurisprudence. But this is not true with regard to the interpretation of state laws or jurisprudence. If the Supreme Court of the United States were to assume jurisdiction in order to fix the jurisprudence in Louisiana in a case of this kind, it would be failing to apply the law of Louisiana as required in the *Erie Railway Co.* case and subsequent approving decisions. We would have the anomalous situation where the Supreme Court of the United States would be directing the Federal Courts of Appeal to apply substantive law in local matters even though it might conflict with the recognized jurisprudence established by the state courts. In *Cooper v. Brown*, 126 F. 2d 874, Headnote 3 reads as follows:

> "Sufficiency of evidence is a matter of substance within the rule that where federal jurisdiction of cases depends on diversity of citizenship, said court is bound by state law as to matters of substance."

The above was affirmed in principle by a Federal Court of Appeal in *Gulf, Mobile and Ohio Railway Co. v. Freund*, 183 F. 2d 1005, Headnote 12 of which reads as follows:

> "Sufficiency of evidence in a negligence case removed to federal court because of diversity of citizenship is a matter of substantive law governed by the law of the state in which the accident occurred."

Manifestly no amount of strained construction can convert this case into one warranting review by certiorari. In the light of the jurisprudence there is no question of federal law requiring the Supreme Court of the United States to take jurisdiction.

(2) The second question presented by petitioners is whether the Court of Appeals for the Fifth Circuit violated the public policy of the State of Louisiana in railroad crossing cases. This point is based on Louisiana Revised Statutes of 1950, Title 45, Section 563 which is a re-enactment of Act 12 of 1924. Petitioners have placed their own interpretation on the statute. The decision of the Court of Appeals is in keeping with the policy of the State as interpreted in numerous decisions of its courts.

Not one Louisiana case is cited by petitioners in support of their point. Their interpretation in effect is that where a jury holds that a railroad is negligent, or that a motorist is not contributorily negligent, this verdict is final. The statute itself does not say so. The State Courts have not interpreted the statute to mean that the verdict of the jury on contributory negligence is final. It is appropriate to refer to the case of *Henwood v. Wallace*, 159 F. 2d 263 which is cited by petitioners. This is the language of the court:

> "The federal courts are bound by state court decisions construing these parts of the law." (p. 265)

What are the state court decisions? The Courts of Louisiana have never given to the statute the interpretation that the verdict of the jury is not open to question. In *Leger v. T & P Ry.* Co., 67 So. 2d 775, which was tried before a jury, a Louisiana Court of Appeals said:

> "We realize that this case was tried by a jury, however, when its verdict is manifestly erroneous, it is the duty of the appellate court to reverse it." (p. 781)

In *Bihm v. N O & M Ry. Co.*, 6 La. App. 655, the court said:

> "The charge of the Judge to the jury is not in the record. We take it that they were properly instructed, but their verdict and the judgment appealed from based thereon is contrary to the law and the evidence. It is therefore annulled, avoided and set aside, etc." (p. 660)

In *Banfield v. L R & N Ry. Co.*, 137 So. 571, the court said:

> "The case was tried by a jury and by a vote of 9 to 3 the plaintiff was awarded judgment in the sum of $12,377.00." (p. 573)

The Court of Appeals nevertheless reversed the verdict of the jury in the *Banfield* case and the judgment entered theron by the District Court, and rendered a decree in favor of the defendant company. To the same effect are the following decisions by Louisiana appellate courts: *Nolan v. New Iberia & N R Co.*, 145 So. 377; *Wyatt v. Y & M V Ry. Co.*, 127 So. 479 (p. 482); *Franklin v. L & A Ry. Co.*, 120 So. 679 (p. 681).

All of the foregoing Louisiana decisions, and many others that we might cite, deal with the interpretation of Louisiana law by Louisiana courts. They conclusively show that R.S. 45:563 has never been construed to mean that the verdict of a jury on the question of contributory negligence is final.

(3) The third question presented in the petition for

certiorari is whether the Court of Appeals exceeded its reviewing power by making findings of fact at variance with the findings of the jury and the District Judge. The judgment of the Lower Court failed to apply the substantive law of Louisiana in connection with admitted facts as required by the *Erie Ry. Co.* case and subsequent decisions. In our brief in the District Court we referred to the decision in *Audirsch v. T & P Ry. Co.*, 195 F. 2d 629 (Fifth Circuit) where the Court emphasized the substantive law of the State of Louisiana to the effect that a strict duty was imposed upon one crossing a railroad track to exercise due care and prudence to avoid injury, and the greater the danger the greater the care that must be exercised.

The Court of Appeal correctly held in the present suit in keeping with the decisions of the Louisiana courts, that a verdict should have been directed because all the inferences which the jury could justifiably draw from the testimony were insufficient to support a verdict for plaintiff. The following federal decisions also support this principle:

> *F. W. Woolworth Co. v. Davis*, 41 F. 2d 342 (Cert. Den. 282 U.S. 859); *Allen v. Penn. Ry. Co.*, 120 F. 2d 63; *Allen v. T & P Ry. Co.*, 96 F. Sup. 520, 195 F. 2d 545; *Northern Pac. Ry. Co. v. Bacon, 91 F. 2d 173* (Cert. Den. 82 L. Ed. 564); *Southern Ry. Co. v. Walters*, 284 U.S. 190, 76 L. Ed. 239; *Brady v. Southern Ry. Co.*, 320 U.S. 476 (p. 479); *Aetna Casualty & Surety Co. v. Yeatts*, 122 F. 2d 350; *Chesapeake & Ohio Ry. Co. v. Martin*, 283 U.S. 209, 75 L. Ed. 983; *Commercial Credit Corporation v. Pepper*, 187 F. 2d 71.

The Court of Appeals decided that there was no substantial evidence with its legitimate inferences to sup-

port the verdict. The Court of Appeals refrained from accepting speculation and possibility as an adequate basis for recovery. It is the rule in Louisiana that negligence is never presumed; that the burden of proving it rests on the one who charges it; that it must be established with reasonable certainty; that the showing of a mere possibility or probability of its existence is insufficient.

The following is a quotation from the case of *Lewis v. Thompson*, 47 F. Sup. 435:

> "Negligence is the breach of a legal duty or obligation; it, or the facts on which it is based must be pleaded and proved; it is never assumed, presumed or predicated upon mere inferences." (Citing *I. C. Ry. Co. v. O'Neal*, 177 Fed. 328, Fifth Circuit, (Cert. Den. 217 U.S. 604, 54 L. Ed. 899).

## II.

## *THE DECISION BELOW IS CORRECT*

The decision of the Court of Appeals discloses a careful analysis of the issues, due consideration of the local law, logical reasoning and proper application of the jurisprudence of the State. Appropriate authorities are cited in support of the Court's conclusion. The decision holds that there was no negligence on the part of the Company and that Mrs. Laborde was guilty of contributory negligence. We will discuss briefly under separate headings the question of defendant's negligence and the contributory negligence of plaintiff.

### (a)

### *There was no negligence on the part of the Railway Company.*

The first charge of negligence is that the Company didn't maintain its right of way so as to allow an approaching motorist a view up and down the track. We

need only point out that plaintiff's own witness testified to the contrary, as set forth in our Statement of the Case. It is the rule of law in Louisiana that a plaintiff is bound by the testimony offered and produced by him; that one who calls a witness vouches for his veracity and for the correctness of his testimony.

*State ex rel Smith v. Dardenne*, 58 So. 1032; *Young v. Williamson*, 133 So. 807; *Evans v. Gas & Fuel Co.*, 140 So. 245.

Not only plaintiffs witness but many others, testified that the train could be seen as it approached the crossing. It is a recognized rule of evidence in Louisiana that positive testimony will overcome negative testimony.

*Handy v. New Orleans Public Service*, 120 So. 271; *Hutchinson v. T & N O Ry. Co.*, 33 So. 2d 139; *Begue v. L & A Railway Co.*, 42 So. 2d 97.

Without considering the overwhelming evidence of defendant, we find that plaintiff failed to show by substantial evidence that she could not see the approaching train. In this connection we refer the Court to photographs D-3 to D-8 inclusive which were taken two days after the accident before there had been any changes at the crossing. It is apparent from these pictures that there is no substantial evidence to support plaintiff's charge of negligence regarding her inability to see the train.

As to the contention that no timely and effective warning was given by those on the locomotive, plaintiff's own witnesses contradicted her on this point. The engineer, fireman and head brakeman who were on the locomotive testified that the whistle started blowing as soon as Mrs. Laborde turned off the highway. They were confirmed in this statement by a Mr. Mayhall who was in a

car behind Mrs. Laborde, saw her when she entered the Highway, and watched her until she went up on the crossing. He stated that the whistle of the train was blowing from the time she entered the gravel road until she reached the tracks. But if this testimony is not to be considered, plaintiff is nevertheless confronted with the fact that two of her own witnesses testified that they heard the whistle before the collision as pointed out in our Statement of the Case.

If we assume that the whistle was not blown, even though the witnesses on both sides said that it was, there was still no negligence on the part of the Railway Company under the law of Louisiana. It is the uniform jurisprudence of the State that those in charge of a train have a right to assume that a vehicle approaching a crossing will stop in time to avert an accident, and there is no negligence in their failure to anticipate that this will not be done.

*Bordenave v. T & NO Ry. Co.*, 46 So. 2d 524; *Levy v. Ry. Co.*, 20 So. 2d 559; *Hanks v. Ry Co.*, 62 So. 2d 139; *Wright v. Ry. Co.*, 19 So. 2d 894.

(b)

***There was contributory negligence on the part of Mrs. Laborde.***

The contributory negligence of the plaintiff was fully established by her own admissions and by the testimony of her witnesses. Whether she underestimated the speed of the train as it approached the crossing, or whether she assumed that she could get over the crossing ahead of the train, or whether she was engrossed in her own thoughts and didn't look or listen, makes no difference. The facts are that she could and should have seen the train and her failure to do so was contributory neg-

ligence. Under the jurisprudence of Louisiana contributory negligence of a plaintiff in the slightest degree precludes recovery.

> "Negligence is contributory in a legal sense when and only when it is a proximate cause of the injury, and if such contribution exists in the least degree there can be no recovery." *Daricek v. Forest*, 173 So. 601, (p. 603).

It is the accepted law in Louisiana that no failure on the part of a railroad company to do its duty will excuse anyone from using his sense of sight and hearing upon approaching a railway crossing; and whenever the due use of either sense would have enabled the injured person to escape the danger, the injury is conclusive evidence of contributory negligence. It is also the uniform jurisprudence in Louisiana that whatever a motorist can see, he must and in legal contemplation does see.

> *Sullivan v. Locke*, 73 So. 2d 616; *Slayter v. T & P Ry. Co.*, 182 So. 343; *Matthews v. New Orleans Terminal Co.*, 45 So. 2d 547; *Wyche v. Bryan*, 28 So. 2d 143; *Vigilant Insurance Co. v. Lumbermen's Mutual Casualty Co.*, 85 So. 2d 87.

The federal courts in Louisiana have consistently applied this rule.

> *Brinson v. IC Ry. Co.* 241 F. 2d 494; *Allen v. T & P Ry. Co.*, 195 F. 2d 545; *Northern Pac. Ry. Co. v. Bacon*, 91 F. 2d 173; *Lewis v. Thompson, Trustee*, 47 F. Sup. 435; *Teston v. Thompson, Trustee*, 77 F. Sup. 823; *IC Ry. Co. v. Leichner*, 19 F. 2d 118.

But if the view was obstructed to the extent described by Mrs. Laborde then she is faced with this dilemma—that she should have taken more than ordinary precautions before attempting to cross the track, and

should have stopped and looked for the train at a place where such action would have been effective. She merely paused, and did so according to her testimony, at a point where she was unable to see anything.

> "The duty to stop, look and listen before crossing a railroad must be performed at a time and place where stopping, looking and listening will be effective." *Young v. La. Western Ry. Co.*, 95 So. 511; *Dardenne v. T & P Ry. Co.*, 127 So. 458; *Wyatt, et al v. Y & MV Ry. Co.*, 127 So. 479.

> "The more difficult it is for them (motorists) to hear or see approaching trains, the greater degree of caution the law requires, because the track itself constitutes a warning of danger, especially where familiar with such crossings and its frequent use as here shown." *Teston v. Thompson*, 77 F. Sup. 823; *Barnhill v. T & P Ry. Co.*, 33 So. 63; *Ill. Central Ry. Co. v. Leichner*, 19 F. 2d 118.

In *Hutchinson v. T & N. O. Ry. Company*, 33 So. 2d 139, plaintiff was travelling on a highway parallel to the railroad and, as in the present case, entered another road to cross the track. He failed to see an approaching freight train and claimed that the view to the east and west was obscured by crossing signs, poles, weeds and bushes. The court answered his contention by stating:

> "Even if the weeds had obscured plaintiff's view as he claims, his duty to stop, look and listen was the more encumbent upon him." (p. 143).

To the same effect is *Stelly v. T & N O Ry. Co.*, So. 2d 640; *Perrin v. New Orleans Terminal Company*, 74 So. 160; *Thompson v. Morgan*, 119 So. 69.

The decision of the Court of Appeals is correct as to contributory negligence on the part of petitioner. The

only justification for deciding against respondent would be to accept Mrs. Laborde's unsupported statement that she could not see or hear the train as it approached the crossing. We do not believe that any court will give credence to the unsupported testimony of a witness that she could not see a train when such evidence conflicts with that of all the other witnesses and with hpysical facts, in view of the holdings of the Louisiana courts. As stated by the Court in *Matthews v. New Orleans Terminal Company, supra*, regarding a motorist's duty at a railroad crossing:

> "He must see that which may be seen and hear that which may be heard, and he is held to have seen that which he could have and should have seen." (p. 552).

## III.

## *THERE IS NO CONFLICT OF DECISIONS*

Petitioner attempts to show that the decision in the present case is contrary to, or inconsistent with other decisions and that there is a conflict in the decisions rendered by various panels of the Court of Appeals for the Fifth Circuit in cases involving collisions at railroad crossings in Louisiana. The substantive rights of parties are to be determined by local law, and there is no federal jurisprudence in negligence cases of this kind which requires a reconciliation of decisions. Assuming that the Supreme Court of the United States will attempt to reconcile conflict of decisions in this type of litigation, it is respondents contention that there is actually no conflict but only factual differences.

*Pokora v. Wabash Railway Company* cited by petitioners merely modifies a ruling in *B & O Railway Co. v. Goodman*, 275 US 66, 72 L. Ed. 167, to the extent that under the latter case the driver of an automobile was re-

quired to stop his vehicle and get out and look for a train if his view was obscured. Justice Cardoza as the organ of the court in the *Pokora* case said with reference to the *Goodman* case:

> "There is no doubt that the opinion in that case is correct in its result, but the Court did not stop there. It added a remark, unnecessary upon the facts before it, which has been a fertile source of controversy." (p. 1153)

Too much importance should not be attached to the *Pokora* case for the reason that it was decided in 1934 at a time when federal courts had their own jurisprudence in negligence cases. The decision in *Erie Ry. Co. v. Tompkins*, rendered in 1938 changed the rule that had been in effect for many years by declaring that the rights of parties in cases of this kind are to be determined by the jurisprudence of the State in which the accident happened.

Petitioners cite *Henwood v. Wallace*, 159 F. 2d 263. The situation there was different from the case now under discussion, as the crossing was in a town of some size and the train approached it at great speed and without warning. The language of the court was that "The defendant owed a duty to those crossing a street such as the one involved here in a town of some 1400 people not to approach it at a great speed and without warning as some witnesses testified." (p. 264) This does not apply to the present case as the accident happened in the open country and under the jurisprudence which has been uniformly followed in Louisiana, it is permissible for a train to operate at any speed consistent with its safety.

*Sullivan v. Y & M V Ry. Co.*, 8 So. 2d 109; *Guidry v. T & N O Ry. Co.*, 56 So. 2d 611.

Another case cited by plaintiff in an attempt to establish conflict of opinions is *Illinois Central Ry. Co. v. Aucoin*, 195 F. 2d 983. The difference between the *Aucoin* case and the present suit is quite obvious. The collision in the cited case occurred during daylight hours where defendant's tracks intersected Government Street in the commercial area of the city of Baton Rouge. The Court said that "In view of the lack of protective devices at this crossing in a commercial district of a popular city it cannot be said as a matter of law that the railroad company was free from negligence." (p. 985)

Another case relied on by plaintiff as showing a conflict in the jurisprudence is *T & P Railway Co. v. Watkins*, 243 F. 2d 171. In that case a diesel tractor was approaching a crossing in a heavy fog which reduced visibility. The driver of the tractor had his back to the train. Evidence showed that the crossing was in frequent use in connection with farming operations and that notice had been given to the defendant of the dangerous condition. That presents an entirely different situation from the present case where the accident happened in broad daylight, plaintiff was approaching the crossing at right angles and the train was on an elevation four feet above the Highway.

Another case cited by plaintiff is *Rhul v. Missouri Pacific Railroad Company*, 304 SW 2d 16. The case is not similar in its facts to the one at bar. In the *Rhul* case certain pictures offered in evidence were shown to have been taken at a time considerably later than the accident and the evidence showed that they did not reflect the true condition. But aside from this, the *Rhul* case is the decision of a court in Missouri and defendant here is not depending on Missouri jurisprudence and its rights are not to be governed by the decisions in that state.

Petitioners refer to *Smith v. T & P Railway Co.*, 189 So. 316. In that case the facts were different. The fireman discovered plaintiff's perilous position and the court found that he could have sounded the whistle in time to prevent the accident.

Another case cited by petitioners is *Browne v. T & P Ry. Co.*, 193 So. 511. This suit involved the death of a pedestrian. He was in close proximity to the tracks before the train hit him and the court said:

> "His posture and movements were sufficient to indicate to the average mind that he was unaware of the train's approach." (p. 516)

The factual situation in the above case is different from the case at bar.

Finally, plaintiff cites *Guillot v. T & P Ry. Co.*, 8 La. App. 143. This case is against petitioners instead of being in their favor. Two boys were driving toward a crossing in a wagon that was being drawn by a mule. The younger boy was only five years of age and therefore incapable of being guilty of contributory negligence, according to the decision. The older boy, however, was 13 years of age and the Court said that "He was guilty of the grossest kind of negligence in permitting the mule to walk upon the track immediately in front of a fast moving train", and this negligence barred any recovery for damages by his father. This decision, therefore, favors respondent here and can hardly be regarded as a citation in favor of petitioners.

## IV.

## *THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW*

Petitioners would make it appear that in the issues decided by the Court of Appeals, there lurks an important question of federal law which the Supreme Court should settle. It is evident from the nature of the case that there is no federal question at all. Neither is there a question presented here of importance in the sense that the court should review the case. The Supreme Court has usually denied certiorari when review is sought of a lower court's decision which turns solely upon an analysis of the particular facts involved, or upon the construction of the Court of Appeals of the jurisprudence of the state where the case arises. It is only where a case acquires importance for some other reason that the Supreme Court will attempt to review the opinion and reexamine the facts. The absence of a legal controversy of importance customarily results in a denial of certiorari. This is specially true in a case where merely the facts are in dispute.

*Southern Power Co. v. North Carolina Public Service Co.*, 263 US 508, 68 L. Ed. 413; *Houston Oil Co. v. Goodrich*, 245 US 440, 62 L. Ed. 385.

The Supreme Court has held that it is a court of law "rather than a court for correction of errors in fact finding", and has stated that it "cannot undertake to review concurrent findings of facts by two courts below in the absence of a very obvious and exceptional showing of error".

*Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 US 271, 93 L. Ed. 672, and cases cited. (p. 677)

As stated by Chief Justice Taft in *Magnum Import Co. v. Coty*, 262 US 159, 67 L. Ed. 922:

> "The jurisdiction (of the Supreme Court to review a case by way of certiorari) was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing."

Petitioners state on page 6 of their brief that the Court of Appeals has "infringed upon their constitutional right to trial by jury and has deprived them of property without due process of law". This is an exaggerated and unwarranted statement and is not justified by the record. In the final analysis the argument of petitioners amounts to this—that a jury having decided in their favor, the verdict is final, and is not open to question by the courts. The Supreme Court had this to say in *Galloway v. U. S.*, 319 US 372, 87 L. Ed. 1458 regarding the Seventh Amendment to the Federal Constitution:

> "If the intention is to claim generally that the Amendment deprives the Federal Courts of power to direct a verdict for insufficiency of evidence, the short answer is the contention has been foreclosed by repeated decisions made here consistently for nearly a century." (L. Ed. p. 1470)

A jury is not at liberty to ignore admitted facts, or draw and inferences or conclusions it desires from established facts, and its verdict will not be allowed to stand when there is no substantial evidence to support it. Speculation and conjecture are not allowed to take the place of legal evidence. The federal courts have consistently upset the findings of a jury where there was no substantial evidence to support it and the verdict was apparently based on speculation and conjecture.

*Southern Ry. Co. v. Walters*, 284 US 190, 76 L. Ed. 239; *Brady v. Southern Ry. Co.*, 320 US

476, 88 L. Ed. 239; *Chesapeake & Ohio Ry. Co. v. Martin*, 283 US 209; 75 L. Ed. 983; *Aetna Casualty and Surety Co. v Yeatts*, 122 F. 2d 350; *F. W. Woolworth Co. v. Davis*, 41 F. 2d 342 (Cert. den. 282 US 859); *Allen v. Penn Ry. Co.*, 120 F. 2d 63; *Chicago, Mil. & St. Paul Ry. Co. v. Coogan*, 271 US 472, 70 L. Ed. 1041; *Gulf, Mobile & Northern Railroad Co. v. Wells*, 275 US 455, 72 L. Ed. 370.

The decision of the Court of Appeals for the Fifth Circuit as to the law of the State of Louisiana was properly applied in this case and should be accepted. This has been the rule followed by the Supreme Court in cases of this kind and there appears no reason for the Supreme Court to vary the rule in the suit now under consideration. The following is from *Regan v. Merchants Transfer and Warehouse Company*, 337 US 530, 93 L. Ed. 1520:

> "But in the present case we look to local law to find the cause of action on which suit is brought. Since that cause of action is created by local law, the measure of it is to be found only in local law. It carries the same burden and is subject to the same defenses in the federal court as in the state court. * * * Otherwise there is a different measure of the cause of action in one court than in the other, and the principle of *Erie Ry. Co. v. Tompkins* is transgressed." (p. 1523)

## CONCLUSION

The evident purpose of petitioners application for certiorari is to have the court classify the present type of litigation with that involving interpretations of a federal statute. This is evidenced by the concluding sentence on page 18 of their brief:

"As this Honorable Court has reinforced the guar-

antees of the Seventh Amendment repeatedly and forcefully in numerous Jones Act and FELA cases in recent years, it is in the public interest that such guarantees be re-emphasized in simple negligence actions and the principle of the *Pokora* case be re-established in railroad crossing cases."

To paraphrase the above we say that petitioners are asking the Supreme Court of the United States to assume jurisdiction where state laws are applicable and to establish federal jurisprudence in negligence action at railroad crossings.

The petition for a writ of certiorari in this case should be denied, and we so pray.

Respectfully submitted,

s/ FRANK H. PETERMAN
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## CERTIFICATE

I certify that a copy of the above and foregoing brief for respondent in opposition has been served upon Camille F. Gravel, Jr., counsel for petitioners, by depositing copy of same in the United States mail with postage prepaid addressed to him at his office, 611 Murray Street, Alexandria, Louisiana, this day of December, 1958.

s/ FRANK H. PETERMAN